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The Honorable Leigh Ingalls Saufley, Chief Justice
The Honorable Donald G. Alexander, Senior Associate Justice
The Honorable Andrew M. Mead, Associate Justice
The Honorable Ellen A. Gorman, Associate Justice
The Honorable Joseph M. Jabar, Associate Justice
The Honorable Jeffrey L. Hjelm, Associate Justice
The Honorable Thomas E. Humphrey, Associate Justice
The State of Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

Attn: Matthew Pollack, Executive Clerk

Re: Proposed Adoption of Model Rule 8.4(g)

Dear Members of the Court:

I am writing this to urge you to reject the proposed amendments to Rule of Professional Conduct 8.4. The Christian Legal Society letter on the subject offers an excellent and detailed analysis, which I don't want to repeat unnecessarily.

But I wanted to stress one particular point, which highlights the First Amendment problem: The rule is expressly crafted as a viewpoint-based restriction of speech, not just in the courtroom but anywhere. *Any* "communication related to the practice of law" "that the lawyer knows or reasonabl[y] should know" is "derogatory or demeaning" "on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity" is forbidden. The comments expressly define "related to the practice of law" as including not just interaction with court personnel or witnesses, but also with "coworkers . . . and others."


Moreover, the proposal is not even limited to situations where the "coworkers" or "others" are unwilling targets (or subjects) of the speech. Expressing derogatory opinions to a coworker who shares those sentiments would be covered (at least unless it involves "advocacy of policy positions or changes in the law"). So long as this is later revealed, perhaps because someone overhears a conversation, sees a forwarded e-mail, or gets information in discovery, the lawyer could face discipline for expressing a forbidden viewpoint.

Indeed, the exclusion of “advocacy of policy positions or changes in the law” is telling. Of course such advocacy cannot be punished, because it is fully protected by the First Amendment. But the First Amendment goes far beyond such advocacy of “policy positions” or legal change; it extends equally to speech about religion, morality, and social conditions, and observations and jokes as well as “advocacy.” Yet the proposed Rule 8.4 would potentially cover such fully protected speech.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Justices unanimously held that a law that simply denied a particular government benefit (trademark registration) for derogatory speech was unconstitutionally viewpoint-based. That is even clearer for a law that threatens professional discipline for people who express derogatory views.

Courts and the bar already have ample authority to restrict rudeness (whether based on race, religion, politics, social class, or anything else) that “is prejudicial to the administration of justice,” Current Rule 8.4(d) & cmt. 3, for instance when it happens in court or in a deposition or a witness interview. But they should not undertake to impose viewpoint-based speech restrictions on speech that merely expresses views that bar officials perceive as “derogatory” or “demeaning.”

Sincerely Yours,

A handwritten signature in cursive script that reads "Eugene Volokh".

Eugene Volokh
UCLA School of Law